

FEB. 24 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-250

ROBERT B. CARLESON, ETC., ET AL.,

Appellants,

VS.

NANCY REMILLARD, ETC., ET AL.,

Appellees.

On Appeal from the United States District Court
for the Northern District of California

Brief for Appellants

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OPINION BELOW

The opinions (majority and dissenting) and Order Granting Declaratory Judgment and Injunctive Relief issued by the three-judge United States District Court for the Northern District of California are reported at 325 F.Supp. 1272.

JURISDICTION

This is a direct appeal to the Supreme Court of the United States, pursuant to Title 28, United States Code sections 1253 and 2101(b), from the final decision of the three-judge District Court below which was convened in

compliance with Title 28, United States Code sections 2281 and 2284.

This case was brought in the court below by appellees on behalf of themselves and all others similarly situated for declaratory and injunctive relief pursuant to Title 28, United States Code sections 2201 and 2202 and Title 42, United States Code section 1983. Jurisdiction of the District Court was invoked pursuant to Title 28, United States Code section 1343(3). [A. 4-5] Since appellees sought to have enjoined a regulation, of statewide applicability, of the California Department of Social Welfare, a three-judge court was convened pursuant to the authority and requirements of Title 28, United States Code sections 2281 and 2284.

The final judgment of the District Court — the Order Granting Declaratory Judgment and Injunctive Relief — was entered on March 31, 1971. Appellants' Notice of Appeal to this Court from that Order was filed in the District Court for the Northern District of California on April 7, 1971. The appeal was docketed in this Court on June 7, 1971 and probable jurisdiction was noted on January 10, 1972.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, according to the allegations of appellees [A. 10-11] and the intimations of the District Court [325 F.Supp. at 1274], the Fourteenth Amendment to the Constitution of the United States.

This case also involves certain provisions of the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394), among which, specifically involved are Title 42, United States Code sections 601, 602(a)(10), and 606(a).

Also involved in this case are federal and state administrative regulations—specifically, United States Department of Health, Education and Welfare (HEW), "Hand-

book of Public Assistance Administration" (hereinafter cited as "Handbook"), Part IV, section 3422, and California Department of Social Welfare Regulation EAS Section 42-350.

The text of each of these statutes and regulations is set forth in the Appendix attached to this brief.

QUESTIONS PRESENTED

1. Does the Social Security Act require that California, and all other states, grant "welfare" benefits [under the Aid to Families with Dependent Children program (42 U.S.C. §§ 601-10)] to families in which the father is "out of the home" in the course of his employment by the United States Government in military service?

2. Assuming the answer to the foregoing question to be in the negative, does the Fourteenth Amendment nonetheless require California, and all other states, to grant such "welfare" assistance to servicemen's families because of either equal protection or due process considerations arising out of the fact that the state grants AFDC benefits to families, *inter alia*, of prisoners and deportees?

STATEMENT OF THE CASE

Appellee Nancy Remillard is the mother of appellee Karen Marie Remillard, a two-year-old child. [A. 5] Gregory Remillard, the husband of Nancy and father of Karen Marie Remillard, is on active duty in the United States Army, having enlisted therein in May 1969, and having reenlisted in March 1970 for a five-year term. [A. 8]

In September 1970, appellee Nancy Remillard applied to the Contra Costa County (California) Department of Social Services for assistance for her and her daughter under the Aid to Families with Dependent Children

(AFDC) program (42 U.S.C. §§ 601-10; Cal. Welf. & Inst. Code §§ 11200-488). [A. 9].

Mrs. Remillard's AFDC application was denied on the ground that Mr. Remillard's absence from the home was not a "continued absence" within the meaning of section 406(a) of the Social Security Act [42 U.S.C. § 606(a)]. The actual legal basis for the denial by Contra Costa County was California Department of Social Welfare Regulation EAS § 42.350.11 [A. 9] (see Appendix, p. A3, *infra*, for text) a regulation of statewide applicability, binding on all California counties (see Cal. Welf. & Inst. Code §§ 10553, 10554, 10600, 10604).

This action was commenced on October 21, 1970, wherein appellees, Mrs. Remillard and her daughter, on behalf of themselves and all others similarly situated,¹ sought a declaration of the invalidity, and an injunction restraining the enforcement, of EAS § 42-350.11 on the grounds that it was in conflict with the Social Security Act [A. 11] and denied appellees due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution [A. 10-11].

Appellants filed an Answer to the Complaint [A. 48] and moved for summary judgment in their favor [A. 52, 53, 80]. Appellees filed a cross-motion for summary judgment [A. 67, 68]. A three-judge court was convened pursuant to Title 28, United States Code sections 2281 and 2284, and heard the cross-motions for summary judgment and appellees' motion for declaratory and injunctive relief on February 25, 1971. It was stipulated at the oral argument that the matter could be submitted for a final decision.

1. According to the Complaint, the plaintiff-appellee class is composed of "mothers and children, residents of the State of California, who have applied for payments under the AFDC program, who are otherwise entitled to such payments, but who have been denied such payments due to . . . [Regulation EAS § 42-350.11]." [A. 6]

On March 31, 1971, the three-judge District Court, over the dissent of one District Judge, issued its Order Granting Declaratory Judgment and Injunctive Relief. 325 F.Supp. 1272. Appellants appeal from that Order.

ARGUMENT

I. Introduction.

The State of California participates (see Cal. Welf. Inst. Code §§ 11200-488) in the Aid to Families with Dependent Children (AFDC) program which was established by the Social Security Act of 1935 (49 Stat. 620, as amended, 42 U.S.C. §§ 301-1394). Because of its decision to participate in that program, California must submit a "State Plan" to the Secretary of HEW for approval (42 U.S.C. §§ 601, 602, 603, 604), which plan must comply with the requirements of the Social Security Act and implementing regulations of HEW in order for California to be eligible for the receipt of federal funds. *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970).

This appeal involves the question of the validity of the provision in the HEW-approved California State Plan that provides that an otherwise "needy" child² is ineligible to receive AFDC benefits when a parent is absent from the home "in connection with . . . active duty in the Armed Services." California Department of Social Welfare Regulation EAS § 42.350.11. See Appendix, p. A4, *infra*.

2. The determination of whether a child is "needy" is made by the State, which is free to set its own standards. *King v. Smith*, 392 U.S. 309, 318 & n.14. In California, "need" is determined according to State Department of Social Welfare regulations developed pursuant to California Welfare and Institutions Code section 11452. It must be noted, however, that this appeal does not raise any issues concerning California's "need standards." Appellees have not challenged those standards, nor have appellants denied that appellees are "needy" under California standards.

Under section 401 of the Social Security Act (42 U.S.C. § 601), provision is made for the granting of assistance to a "dependent child," who is defined in section 406(a) of the federal Act, insofar as pertinent here, as a "needy child . . . who has been deprived of parental support or care by reason of the death, *continued absence from the home*, or physical or mental incapacity of a parent" [42 U.S.C. § 606(a) (emphasis added).] See Appendix, p. A1, *infra*. Additionally, section 402(a)(10) of the federal Act requires that each participating state must provide "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a)(10). See Appendix, p. A1; *infra*.

The initial question in this appeal is whether California, in defining (Reg. EAS § 42-350.11, *supra*) "military orphans" to be ineligible for AFDC benefits, has acted consistently with the requirements of sections 406(a) and 402(a)(10), *supra*, of the Social Security Act. Assuming the answer to this question to be in the affirmative, there then arises the question whether the California "ineligibility policy" comports with due process and equal protection requirements of the Fourteenth Amendment.

In this brief, the statutory (or Supremacy Clause) question will be dealt with first in a two-stage process, in which the arguments presented are intended to be offered as alternatives. This approach appears appropriate in view of the uncertainty as to the intended scope of this Court's recent ruling in *Townsend v. Swank*, _____ U.S. _____, 92 S.Ct. 502 (1971).³ Thus, it will be submitted, first, that *Townsend*

3. In *Townsend*, an Illinois AFDC statute and regulation were invalidated because they contained eligibility criteria which were drawn more narrowly than the eligibility standards mandated by Congress in the Social Security Act. The state laws specifically were held to be unconstitutional under the Supremacy Clause. 92 S.Ct. at 505.

disapproves of HEW's approach⁴ of deferring to reasonable, state-determinations of eligibility standards *only* when it is clear that Congress has imposed inflexible, mandatory national standards—a situation not present with respect to the definition of “continued absence” [42 U.S.C. § 606(a)] at issue here. Under this interpretation of *Townsend*, California would remain free to make its own determination of whether or not to include servicemen's families within its AFDC eligibility policies. HEW, “Handbook,” Part IV, § 3422. See Appendix, p. A 2, *infra*.

In the alternative, however, if this Court intended *Townsend* to require national, uniform eligibility standards for *all* aspects of the AFDC program, then it is submitted that in this case this Court should pronounce the national standard to be that a child whose father is away from home on active military duty is *not* a “dependent child” within the meaning of the Social Security Act [42 U.S.C. § 606(a)], and thus, is not eligible to receive AFDC benefits.

II. The Social Security Act Does Not Require California to Treat a “Military Orphan” as a “Dependent Child” Eligible to Receive AFDC Benefits.

A. California Retains the Option to Define “Continued Absence” as Not Including a Father's Military-Duty Absence.

At the time that this case was briefed and argued in, and decided by, the District Court below, the status of the law, as pertinent here, was as follows:

„ Section 401 of the Social Security Act provided for the granting of AFDC benefits or assistance to a “dependent child.” 42 U.S.C. § 601.

Section 406(a) of the Social Security Act defined a “dependent child” as a “needy child . . . who has been

4. See HEW's “Condition X” [45 C.F.R. §233.10(a).(1)(ii)]; Note, *Welfare's “Condition X,”* 76 Yale L.J. 1222 (1967).

deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. . . ." 42 U.S.C. § 606(a).

HEW interpreted "continued absence" strictly: the absence must be such as "to interrupt or to terminate the parent's functioning as a provider" and the "duration of the absence precludes counting on the parent's performance of his function." HEW, "Handbook," Pt. IV, § 3422.2. As an example of the type of situation falling within its interpretation, HEW cited the case where the father, unannounced, deserts the family and disappears. *Id.*

Within the foregoing interpretation, however, as correctly noted by the District Court (325 F.Supp. at 1273), "[t]he precise definition of 'continued absence' rests with the States." HEW required only that within its "continued absence" guidelines, a state "will find it necessary to give consideration to such situations as divorce, . . . [etc.], employment away from home, service in the armed forces or other military service, and imprisonment." "Handbook," § 3422.2, *supra*.

Pursuant to the option granted (or requirement imposed) by HEW that each state develop its own "continued absence" definition, California and, according to one survey [see A. 72, 78-79], approximately twenty other states, had defined the term as *not* including military-service absence. HEW had approved that policy adopted by California; indeed in the Brief for the United States as Amicus Curiae filed in this case, it was expressly stated that California had acted within its discretion in developing its military-service ineligibility policy.

Within this legal frame of reference, the District Court nonetheless held that California has violated the federal Act and the HEW regulation by making an "across-the-board," group-determination of ineligibility for service-men's families. See 325 F.Supp. at 1273. It is submitted that the District Court erred⁵ in this regard, as is discussed *infra* at 13-14. However, consideration must be given first to the ramifications of the *Townsend* decision, *supra*, in terms of its effect on the legal framework, described above. We do not believe that that structure has been changed.^{6a}

On its face, it is submitted that *Townsend* is significantly distinguishable from this case. In that case, Illinois had defined AFDC-eligible dependent children to include 18-20-year-old high school or vocational school students, but not children of the same age group attending college. See 92 S.Ct. at 504 & n.1. On the other hand, Congress, in section 406(a)(2)(B) of the Social Security Act, had imposed a definitional standard in unequivocal, unambiguous language, that the group of eligible individuals was to include needy dependent children under the age of twenty-one who were students "regularly attending a school, college, or university, or regularly attending a course of vocation or technical training..." 42 U.S.C. § 606(a)(2)(B).

Thus, with respect to eligibility in *Townsend*, Congress had provided the definitional content of the term "student".

5. In the Government's amicus brief filed herein, HEW does not specifically state that the District Court misinterpreted the requirements of the Department's regulation (Handbook § 3422, *supra*). That conclusion appears inescapably implicit, however, in the Government's approval, expressed in the brief, of California's exercise of its conceded eligibility-policy discretion.

6. It should be pointed out in this regard that probable jurisdiction was noted in this case on January 10, 1972, almost three weeks after *Townsend* was decided on December 20, 1971.

It was unnecessary and inappropriate for the states (or for HEW⁷) to give interpretative substance to the term.⁸

Additionally, in *Townsend*, as was forcefully traced by the Court, there was considerable legislative history to establish the fact that "Congress meant to continue financial assistance for AFDC programs for the age group only in States that conformed their eligibility requirements to the federal eligibility standards." 92 S.Ct. 506. In other words, Congress had directed nationally-uniform implementation.

We believe that this case—and the provision of the Social Security Act in question—are completely different from *Townsend*. Indeed both HEW and appellees have articulated the distinctions. In the Government's amicus curiae brief filed in *Carter v. Stanton*, Oct. Term 1970, No. 70-5082, (at pages 20-21), it is stated on behalf of HEW that:

"With respect to the 'continued absence' provision of Section 406(a) . . . , there is no legislative history which deals specifically *either with the meaning of the term 'continued absence' or the degree of state discretion to implement that test of independence.*" (Emphasis added).

Similarly, appellees, in their Motion to Affirm filed herein (at pages 8-9), distinguished *Townsend* [and the similar case of *McClelland v. Shapiro*, 315 F.Supp. 484 (D. Conn. 1970)] in the identical respects as we distinguish it:

7. As the Court stated in *Townsend*, with respect to "student" eligibility, there was no room for HEW's deferential "Condition X" policy to operate, since the precisely established Congressional standard precluded any variances. See 92 S.Ct. at 505 & n.3.

8. Similarly, in *King v. Smith*, 392 U.S. 309 (1968), Congress had used the term "parent" in the Social Security Act as a short-hand label. But the meaning or definitional content of the word-of-art had been made perfectly clear: it connoted a "breadwinner" who was legally obligated to support his children. *Id.* at 329. Thus, Alabama was foreclosed from defining Mrs. Smith's fleeting paramour as a "parent," since Congress had provided a contrary definition. *Id.* at 333.

"[T]hose cases are clearly distinguishable. Those cases involve a section of 42 U.S.C. 606(a) different from that interpreted in *King v. Smith, supra*, and deal only with the question of the validity of a state's refusal to grant AFDC benefits on the basis of age restrictions which are narrower than those provided for by the Social Security Act [42 U.S.C. § 606(a)(2)]. They involve provisions of the Social Security Act which have been altered several times by Congress and which have a long legislative history as regards mandatory implementation by the states. By contrast, the 'continued absence from the home' element of 42 U.S.C. § 606(a) has remained unamended since the Act's original enactment in 1935." (Footnote omitted and bracketed material added).

Thus, all appear to agree that there is a lack of a Congressional definition of "continued absence," and in view of that void, we believe, there is also an easily understood, and logical, absence of any indicia of Congressionally-mandated nationally uniform implementation of that test of dependency and AFDC-eligibility.⁹ *A priori*, then, the principal of *King v. Smith* (that a state, without Congressional authorization, may not exclude from eligibility those persons made eligible by Congress¹⁰) is totally inapplicable when, as here, Congress has failed to provide the eligibility definition (of "continued absence"). And, in the absence of such an eligibility definition, it is to beg the question to say that a state has breached its federally-imposed obligation to furnish aid with promptness "to all eligible individuals" [42 U.S.C. § 602(a)(10)].

Instead of having specified the standard of "continued absence" and mandated its implementation with national

9. Indeed, there exists a suggestion that Congress may have intended to allow states to eliminate entirely "continued absence" as an eligibility criterion. See 79 Cong. Rec. 9269 (1935).

10. See *Townsend v. Swank, supra*, 92 S.Ct. at 505.

uniformity, Congress left the term to the administrative interpretation of, and implementation by, HEW. And for the more than thirty-five-year history of the Social Security Act, Congress has left untouched not only the "continued absence" provision of the Act itself, but HEW's implementation thereof as well. In view of this lack of legislative disapproval [*cf. United States v. Shreveport Grain & Elev. Co.*, 287 U.S. 77, 84 (1932); 2 J. Sutherland, *Statutes and Statutory Construction* 525 (3d ed. F. Horack 1943)], it is submitted that HEW's longstanding policy should be accorded considerable deference and weight. *Lewis v. Martin*, 397 U.S. 552, 559 (1970).

Turning then to the HEW regulation concerning "continued absence," and California's implementation thereof, the two are completely compatible—contrary to the holding of the District Court.

HEW has provided a "strict" interpretation of the "continued absence" facet of dependency, treating it as something akin to death in terms of the economic and social implications for the family: the absence must cause severe intrafamilial dissociation and must be of a nature which "precludes the parent's being counted on for support or care of the child." HEW, "Handbook," § 3422.2 (emphasis added). The federal agency's example of its own interpretation is where the father "has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return." *Id.*

"The precise definition of 'continued absence' rests with the States," as noted by the District Court, 325 F.Supp. at 1273. HEW requires only that within its interpretation (§ 3422, *supra*), each state, "in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, . . . [etc.], employment

away from home, service in the armed forces or other military service, and imprisonment." § 3422.2.

California has done exactly what HEW has directed—as manifested in its Regulation EAS § 42-350 (Appendix, p. A3, *infra*). Each of the situations noted in the HEW regulation has been "considered" by California and children in each of the groups are considered eligible (EAS § 42-350.2), except in three instances (EAS § 42-350.11), *i.e.*, when a parent is absent on "trips made in connection with current or prospective employment," or on "active duty in the Armed Services." Obviously, these are three of the situations which HEW requires the state to "consider:" *i.e.*, situations of "search for employment, employment away from home, service in the armed forces or other military service." Handbook § 3422.2.

However, the District Court has stated that California has improperly interpreted the HEW phrase "will . . . give consideration to . . ." According to the lower court, California considers each applicant's situation individually in situations of "imprisonment, or temporary medical treatment, or parental separation," with "no across-the-board exclusion of any of these categories," but gives "a different kind of 'consideration'" to the military-service situation by judging the group, as a group, to be ineligible. 325 F.Supp. at 1273. In this regard, the District Court is in error. California gives consideration to *each* group, *as a group*, listed in the HEW regulation. A child whose father is imprisoned or has been deported or who has deserted the family is treated as eligible to receive AFDC, not because of his individual situation, but because he is a member of the group which has been determined to be eligible. Similarly, the child whose father is looking for work, or working, away from home or is in the military is deemed ineligible because

California has "given consideration" to those situations and adopted a policy of group ineligibility.

Furthermore, contrary to the District Court's determination (325 F.Supp. at 1273) HEW allows, and the decision in *Damico v. California*, No. 46538, (D.C.N.D. Cal. Sept. 12, 1969)¹¹ does not prohibit, this type of "consideration" and group-eligibility determination. *Damico* held, rather, that California, having "given consideration" to the situation postulated by HEW as "desertion or informal separation" (Handbook § 3422.2), and having decided that children in such situations are eligible to receive AFDC, the State could not then impose an absolute three-month waiting period as a requirement of establishing "deprivation" and eligibility. The problem in *Damico* was not that California had made a group ineligibility determination, as suggested by the District Court here (325 F.Supp. at 1273), but rather, that California was arbitrarily denying aid to children who were part of a group whom California had determined to be eligible. In contrast, here, California has made the determination which HEW allows it to make, that a father's absence on military duty does not, *per se*, give rise to dependency and AFDC eligibility.¹²

11. This Court reversed the District Court in *Damico* on the question of exhaustion of state administrative remedies and remanded the matter. *Damico v. California*, 389 U.S. 416 (1967). On remand, the District Court invalidated statutory and regulatory provisions of California law which imposed a three-month waiting period for AFDC eligibility for children deserted by one parent unless the remaining parent took earlier legal action to terminate the marriage. The opinion of the District Court, dated September 12, 1969; is unpublished. However, since the District Court in this case placed considerable reliance on the District Court decision in *Damico*, excerpts from the *Damico* decision are set forth in Appendix E attached to the Jurisdictional Statement at pp. A25-29.

12. It should be noted that under the California regulation, military-duty absence, by itself, does not constitute "continued absence" which would trigger AFDC eligibility. However, if in conjunction with the military assignment, other factors, *e.g.*, a

The District Court, as a further basis for its invalidation of the California regulation, while purporting not to decide the constitutional issues presented,¹³ nonetheless stated that "it finds them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California." 325 F.Supp. at 1274.

It is submitted that the District Court erred in allegedly basing its decision on an interpretation of the Social Security Act which it deemed necessary to avoid reaching supposedly grave substantive constitutional problems. The California regulation comports with the requirements of the Fourteenth Amendment.¹⁴ Thus, while we do not quarrel with the rule that a statute should be construed in a fashion to avoid the necessity of passing upon constitutional issues (*Townsend v. Swank*, *supra*, 92 S.Ct. at 508), the principal may not be used as a ploy for misconstruing a statute to avoid reaching non-existent constitutional problems.¹⁵

In summary, there is a complete dearth of authority for the proposition that the Social Security Act, or the valid implementing regulation of HEW, compels California to grant AFDC benefits to children whose fathers are away from home on military duty. Indeed, what evidence does

breakup of the marriage, develop, the child would then become eligible to receive aid. California does consider other factors, but requires that there be something more than mere military-duty absence as the predicate for AFDC eligibility.

13. In their Complaint, appellees urged that the California regulation denied them equal protection and due process. [A.10-11]. The case was extensively briefed [A.26-32, 60-65, 74-77, 83-84] and argued below on those constitutional issues.

14. See Argument III, *infra*.

15. HEW shares the view that there is no Fourteenth Amendment defect in the challenged California regulation. Government's Amicus Brief herein at 4, n.2.

exist indicates a contrary Congressional intent¹⁶ and in view of those indicia, it is reasonable for California to have adopted its ineligibility policy vis-a-vis "military orphans."

B. Alternatively, A Serviceman Is Not "Continuously Absent" and His Child Cannot Be Considered as an AFDC-Eligible Dependent Child.

The AFDC provisions of the Social Security Act were born out of the economic miseries of the Great Depression of the 1930's. Congress reacted particularly to the misfortunes of hungry children. See *King v. Smith, supra*, 392 U.S. at 327 & n.24. However, as this Court noted in *King v. Smith*, the AFDC program was severely limited in its purposes—both in its inception and as it remains today.

"The AFDC program . . . was *not* designed to aid *all* needy children. The plight of most children was caused simply by the unemployment of their fathers. With respect to these children, Congress planned that 'the work relief program and . . . the revival of private industry' would provide employment for their fathers. S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935). As the Senate Committee Report stated: 'Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family.' *Ibid.* [* * *]

"The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. *It was designed to protect what the House Report characterized as '[o]ne clearly distinguishable group of children.'* H.R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). *This group was composed of children in families without a 'breadwinner,' 'wage earner,' or 'father,'* as the repeated use of these terms throughout

16. In the next succeeding subsection of this Argument, it will be pointed out that if this Court holds that there must be a uniform standard of "continued absence" eligibility, then concerning the absence of a serviceman, the determination should be of ineligibility. In terms of the general, overall Congressionally-enunciated purposes of AFDC, it would appear that "military orphans" were not intended to be included within its coverage.

the Report of the President's Committee, Committee Hearings and Reports and the floor debates makes perfectly clear." *King v. Smith*, 392 U.S. 309, 328-29 (1968) (Footnotes omitted and emphasis added).

Thus, public assistance through AFDC "was intended to provide economic security for children," *id.* at 329, only in the limited family-situations where the expectation of relative economic security inuring to a child from his parent was destroyed by the death or incapacity of the breadwinner or by some similar type of substantial intra-familial dissociation, denominated by Congress as a "continued absence." Congress made clear that AFDC was *not* for the purpose of assisting children whose neediness was due to the inability of the family-breadwinner to support them because of the lack of a good job.

Significantly, appellees have not cited any authority in refutation of the foregoing proposition (or in support of the converse). They merely stress that they are "needy"—a point which appellants conceded in the District Court [see A. 54 n.1] and concede here (see n.2, *supra*). But "need" is only one of the prerequisites to eligibility.¹⁷ The needy child must also be "dependent" [42 U.S.C. §§ 601, 606(a)] in order to be eligible.

Appellees do not demonstrate how or why they should be found to be "dependent." Rather, they beg that question and then, to complete the circular process, assert that California has violated section 402(a)(10) by denying aid to them as "eligible individuals" [42 U.S.C. § 602(a)(10)]. Presumably appellees are unable to fit themselves within

17. One rebels at the notion that needs of children may ever be considered an irrelevance. However, "a natural father at home may fail actually to support his child but his presence will still render the child ineligible for assistance." *King v. Smith*, *supra*, 392 U.S. at 329. That is, in determining AFDC eligibility, "need" is not the sole criterion, nor is it the measure of the amount of assistance unless it exists as a result of "dependency."

that one limited group of "eligible" families—that in which the child lacks a "wage-earning" father. For to be sure, the military-father is a "breadwinner," in the employ of the United States of America. The "needs" of his children can best be met by Congress, "in its traditional solicitude for the soldier and his dependents" (District Court Opinion, 325 F.Supp. at 1274) through increased pay¹⁸ and improved allotment procedures,¹⁹ rather than out of the treasuries of the counties and states where the soldier's family happens to reside.²⁰

18. Indeed, Congress has recently enacted sweeping military pay raises which should relieve the "needs" of appellees. The Court may also take judicial notice, we believe, of the current efforts of Congress and the President to abolish the draft by recruiting an "all-volunteer" Army through incentives such as improved pay and benefits.

19. "The affidavits of . . . [appellees] which have been filed herein are poignant indictments of both the military pay scales and the efficiency of the military allotment procedures. However, those inadequacies do not trigger an AFDC eligibility. . . . [Appellees'] attacks should be on the military establishment rather than on the Welfare Administration of the State of California." Dissenting Opinion Below of Conti, D.J., 325 F.Supp. at 1275.

20. It is important to bear in mind that the issue in this case is not limited to whether California must grant AFDC benefits to families of servicemen, who previously as civilians, were California residents, or who, upon completion of military tours, will resume or acquire California residency. Rather, the issue is whether every military-family which happens to be in California at a time when the father is "out of the home" must be considered as AFDC-eligible if there is a needy child present. The fiscal inequities inherent in a requirement of AFDC-eligibility for all such families are apparent. States such as California and Washington, because of geographic locale, are major embarkation points in conjunction with the war in Southeast Asia and in general with military activities in the Pacific Area. Literally thousands of military persons from elsewhere in the Nation have been ordered to report to the West Coast, from where they subsequently are ordered into the Vietnamese or Laotian jungles or onto a ship to patrol the Indian Ocean in furtherance of the Pentagon's determinations of national security. Their families are left on the West Coast to await their return. We do not believe that the taxpayers of the West Coast (or of any other area of the country) should be required to

In developing its eligibility policy, California has determined that a parent who is fully employed²¹ and "out of the home" in connection with his employment—be it in a civilian²² or military capacity—is not "continuously absent." The Social Security Act does not compel a contrary determination. And indeed, if the Social Security Act, as interpreted in *Townsend v. Swank*, compels all states to define "continued absence" uniformly, it is submitted that the California definition, which excludes servicemen, is the correct interpretation of the Act as its scope was carefully delimited in *King v. Smith, supra*, 392 U.S. at 328-29.

III. In Determining "Military Orphans" to Be Ineligible to Receive AFDC Benefits, California Does Not Run Afoul of the Fourteenth Amendment.

The District Court has held that the Social Security Act must be interpreted as requiring California to grant AFDC benefits to children whose fathers are in the military because a contrary construction "would raise serious questions under the equal protection and due process clauses of the Constitution." 325 F.Supp. at 1274. This bootstrap argument is unsound because there are no constitutional inhibitions against the exclusion of "military orphans" from AFDC benefits.

pay a disproportionately large share of America's Southeast Asian War costs through AFDC subsidies to "military orphans." Moreover, the same must be said, with even more force, of the unequal financial burdens placed on the taxpayers of the West Coast counties in which lie major "shipping-out" points in connection with this country's Asian military activities.

21. California participates in the "AFDC-U" program (see 42 U.S.C. § 607)—the so-called "Unemployed Father" program. However, that program is not an issue here since we are concerned with *employed* fathers.

22. At the time of oral argument in the District Court, a question was raised as to whether California considered families eligible for AFDC when a parent was absent due to *civilian* employment. See 325 F.Supp. at 1273, n.3. The answer to the question appears in

The District Court did not "reach the Constitutional arguments advanced herein, but . . . [found] them sufficiently compelling to warrant the conclusion that Congress did not intend its program to be administered in the manner chosen by California." *Id.* It is submitted that appellees' constitutional arguments are not compelling; indeed, they are totally without merit.

Appellees' equal protection argument as set forth in their Brief in Support of Motion for Preliminary Injunction is that "[t]he effect of California's military service exception is to create two classes of needy families indistinguishable from each other except that one is composed of families in which the father is absent by virtue of his service in the Armed Forces, and the other is composed of families in which paternal absence stems from some other reason." [A. 26] They state that "it is difficult to imagine what basis the State could have for denying assistance to the needy families of absent servicemen when it grants the same assistance to the needy families of prisoners and deportees." [A. 27] Surely, the patently obvious differences between prisoners and deportees on the one hand and servicemen on the other could not be so misapprehended by the District Court, nor could those differences so completely elude appellees.

Remembering that Congress has premised AFDC eligibility on the absence of an expectation of relative economic security inuring from breadwinner to child (*King v. Smith, supra*), the rationality of excluding servicemen's children, but not prisoners' or deportees' children, is obvious. In the case of the serviceman, there simply is not the intra-familial dissociation of the type which emanates from the attendant stigmas of imprisonment or deportation of a

Regulation EAS § 42-350.11 (Appendix, p. A3, *infra*). California does not consider such families to be eligible.

father.²³ And of course, the economic implications of imprisonment or deportation differ substantially from military induction or enlistment. An imprisoned father can offer no economic security to his family. And while a deported father may find employment in the country to which he is deported and choose to continue to support his family in this country, the expectation of either contingency occurring is slight. Moreover, there is no effective legal means to compel him to continue to support his family. In contrast, the serviceman suffers nothing even approaching the social ostracism of imprisonment or deportation. In addition, not only is he employed, but employed by the Federal government, and extensive military "allotment" procedures exist as a means to "insure" that part of his pay ends up in the hands of his wife and children. See generally, U.S. Department of Defense, "Military Pay and Allowances Entitlement Manual." But see n.19, *supra*.

The dilemmas confronting appellees here are not unlike the predicament in which the plaintiffs found themselves in *Macias v. Richardson* (D.C.N.D. Cal., No. 50965, Jan. 5, 1970), *aff'd* 400 U.S. 913 (1970).²⁴ Just as the regulations

23. The District Court commented that in certain instances, military service may cause a considerable intra-familial disruption. 325 F.Supp. at 1274. Even assuming the correctness of that court's speculation, it does not follow that a violation of the equal protection clause has occurred by reason of such a fact. It is axiomatic that a classification which has some "reasonable basis" does not offend the Fourteenth Amendment simply because it "is not made with mathematical nicety or because in practice it results in some inequality." *Lindley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). *Accord, Dandridge v. Williams*, 397 U.S. 471 (1970).

24. In *Macias*, the plaintiffs challenged the constitutionality of federal and California regulations in the AFDC-U program [the so-called "Unemployed Father" provisions of the AFDC law (see 42 U.S.C. § 607)] which imposed "arbitrary" cut-off points, in terms of the number of hours worked, in defining which fathers were "unemployed" and which were not. This Court approved the Congressional differentiation between the "unemployed" and the underemployed" and upheld the regulations.

in *Macias* drew a line between the unemployed and the underemployed, the California regulation here differentiates between the unemployed imprisoned father and the underemployed serviceman father, providing for AFDC eligibility of the families of the former, but not the latter. But the dilemmas posed by, and potential solutions for, underemployment are different from those for unemployment. Cf. *King v. Smith*, supra, 392 U.S. at 328-29. And "[t]he constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The AFDC program is not designed to aid families of underemployed "breadwinners," *King v. Smith*, supra; *Macias v. Richardson*, supra, and the classifications drawn in the California regulation "are reasonable in light of . . . [the purposes of AFDC]." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Appellants submit that the California regulation satisfies with ease the equal protection maxim that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

Yet, appellees have urged that the "traditional equal protection test" is inapplicable here and that rather, the more stringent "compelling state interest" test of *Shapiro v. Thompson*, 394 U.S. 618 (1969), must be applied. Appellees' argument has been that one of the possible reasons for the California exclusion of "military orphans" from AFDC eligibility "is to discourage service in the military." [A.27] They then urge such a purpose is invalid because it infringes on a "constitutional right" to serve in the military. It is suggested that this "right" is to be found in the penumbra of the Constitution along with the "right to travel" noted in *Shapiro v. Thompson*, supra. [A.27]; and see Appellees' Motion to Affirm at 16-17.

In *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court held that the ordinary "any reasonable basis" standard applies in testing social welfare laws under the Equal Protection Clause. In an obvious attempt to avoid the implications of that ruling, appellees have transmogrified the *duty* or "obligation of the citizen to render military service," *The Selective Draft Law Cases*, 245 U.S. 366, 375 (1918), into an imaginary *right* to military service. Moreover, even assuming the existence of such a "right," it is not being infringed by the California regulation. Unlike *Shapiro*, where the durational residence requirements imposed upon potential welfare recipients infringed *their* right to travel, here, it is not the "right" of the father to serve in the military that is at stake, but rather the claimed right of his dependents to receive AFDC. Thus a "compelling" state interest need not be shown. Cf. *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 806-808 (1969).

Dandridge v. Williams, *supra*, involved classifications affecting "the most basic economic needs of impoverished human beings." 397 U.S. at 485. Yet *Dandridge* applied the traditional "any conceivable state of facts" equal protection test, and the same must be done here. The California regulation passes that test.

Appellees also asserted in the District Court [see A.30-32, 76-77], as they have here (Motion to Affirm at 17-19),²⁵ that California Regulation EAS § 42-350 constitutes "a denial of due process in that it embodies a conclusive presumption

25. In their Motion to Affirm, appellees, for the first time, alleged that California "has encroached upon the authority of Congress to raise and maintain its armies" (Mot. Aff. at 12) by adopting its policy of AFDC-ineligibility for serviceman's families. Appellees' argument seems convoluted, at best, since the very reason they claim to be eligible for AFDC is because the man in each of their respective families is *in fact in the Armed Services*. By that fact, it is eminently apparent that California has not encroached upon any exercise of Congressional military power; the men are in service.

that a father who is absent from the home due to his military service is not continuously absent from the home, which presumption is arbitrary, capricious, and irrational." [A.32] Once again, however, appellees have assumed the ultimate conclusion (that they are eligible to receive AFDC) in making their basic due process assertion. In fact, the California non-eligibility policy is rational and in conformity with the Congressional purposes underlying the AFDC program of providing assistance to families who lack a breadwinner. *King v. Smith*, 392 U.S. 309 (1968).

Stripped to its essentials, appellees' due process contentions represent little more than an expression of their view that the exclusion of servicemen's children from AFDC eligibility manifests unsound policy. However, the Fourteenth Amendment can no longer be thought to empower federal courts to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). As this Court stated recently, "that era long ago passed into history. *Ferguson v. Skrupa*, 372 U.S. 726." *Dandridge v. Williams*, *supra*, 397 U.S. at 484-5.

CONCLUSION

Neither the Social Security Act nor the United States Constitution compels California to grant AFDC benefits to families in which the father is employed away from home by the Armed Services of the United States. In holding to the contrary, the District Court has erred. The court below should be reversed and should be directed to dismiss appellees' Complaint.

Respectfully submitted,

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February 1972

Statutes and Regulations Involved**United States Code****42 U.S.C. § 601**

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S. § 602(a)(10)

A State plan for aid and services to needy families with children must . . . provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals.

42 U.S.C. § 606(a)

The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt,

first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment....

HEW, "Handbook of Public Assistance Administration," Part IV

3422. *Continued Absence of the Parent from the Home*

3422.2 *Interpretation*—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:

1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return.

Within this interpretation of continued absence the State agency in developing its policy will find it neces-

sary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment.

California Department of Social Welfare, "Public Social Services Manual"

**EAS 42-350 CONTINUED ABSENCE OF A
PARENT**

.1 Definition of "Continued Absence"

"Continued absence" exists when the natural parent is physically absent from the home and the nature of the absence constitutes dissociation, that is, a substantial severance of marital and family ties that deprives the child of at least one of its natural parents.

A substantial severance of marital and family ties means that the absence is accompanied by a definite interruption of or marked reduction in marital and family responsibilities and relationships compared to previously existing conditions.

"Continued absence" does not exist:

.11 When one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services.

.12 When both parents are maintaining a home together but the child lives elsewhere. It is immaterial whether the child lives with a relative or in foster care as a result of placement by the parents, by an agency acting on behalf of the parents, or by an authoritative agency.

.2 Circumstances That Meet the Definition of "Continued Absence"

The physical absence of a parent from the home in conjunction with any one of the following circumstances shall be considered to meet the definition of "continued absence":

.21 The parents are not married to each other and have not maintained a home together.

.22 The parent

.221 Is not legally able to return to the home because of confinement in a penal or correctional institution, or

.222 Has been deported, or

.223 Has voluntarily left the country because of the threat of, or the knowledge that he or she is subject to deportation.

.23 A parent has filed, or retained legal counsel for the purpose of filing an action for dissolution of marriage, for a judgment of nullity, or for legal separation.

.24 The court has issued an injunction forbidding the parent to visit the spouse or child.

.25 The remaining parent has presented a signed, written statement that the other parent has left the family and that dissociation within the definition of "continued absence" exists.

.26 Both parents are physically out of the home and their whereabouts are not known.